

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH DAKOTA

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

PIERRE, SOUTH DAKOTA 57501

IRVIN N HOYT

CHIEF BANKRUPTCY JUDGE

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September 23, 1997

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Chapter 7 Trustee
Post Office Box 8285
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Subject: ***In re Stanley T. and Lynne D. Cichonski,***
Chapter 7; Bankr. No. 97-50170

Dear Counsel and Trustee:

The matter before the Court is Debtor's Motion to Dismiss Case and the Trustee's informal request for costs. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the case should be dismissed upon the payment of certain costs and fees to the case trustee.

SUMMARY OF FACTS. Debtors filed a Chapter 7 petition on April 10, 1997. In their schedules and statements of financial affairs filed with their petition, Debtors stated that they had a homestead valued at \$13,000.00 (their interest only) and personalty valued at \$3,425.00. They declared it all exempt.

On May 19, 1997, Debtors filed a reaffirmation agreement regarding the debt on their homestead, a mobile home valued in the reaffirmation agreement at \$30,700.00. On July 2, 1997, Debtors filed a motion to dismiss their case. They stated therein that they were now able to borrow sufficient sums from family members to pay their creditors. On July 7, 1997, Trustee Whetzal filed an objection to Debtors' claimed exemptions. He argued Debtors had undervalued a 1990 Harley Davidson motorcycle, a 1973 Chevrolet pickup, and a 1981 Chevrolet Blazer. Trustee Whetzal filed an objection to Debtor's motion to dismiss on July 22, 1997. He stated that his investigation indicates that Debtors had scheduled the Harley Davidson at \$1,300.00 based on their assertion that the motorcycle had a "blown engine." Trustee Whetzal further stated that his investigation established that the motorcycle was in good

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running condition on the date of filing and was worth \$12,000.00. In addition to this alleged fraud by Debtors, Trustee Whetzal also stated that Debtors had not provided him with copies of any agreements between Debtors and their creditors that would assure that the creditors would be paid. The Trustee also objected to dismissal because he had incurred substantial costs in the case.

A hearing on Debtors' motion to dismiss and on the Trustee's objection to exemptions was held August 5, 1997. The parties stated they had an agreement whereby Debtors would pay the Trustee \$870.72 in costs, that Trustee Whetzal would consent to dismissal, and that Debtors would pay their creditors outside of bankruptcy. Trustee Whetzal stated he was satisfied that Debtors had suitable arrangements with their creditors. Trustee Whetzal also stated he had referred the case to the United States Trustee and to the United States Attorney for criminal prosecution. Attorney Hoggatt recited Debtors' agreements with their creditors to settle the claims outside bankruptcy.

The Court took under advisement Debtor's motion and the Trustee's request for costs. By letter dated August 12, 1997, Assistant U.S. Trustee Bruce J. Gering advised the Court that neither his office nor the United States Attorney's office objected to dismissal of the case. He indicated that a dismissal would not affect any potential criminal case against Debtors.

On September 12, 1997, Trustee Whetzal provided, at the Court's request, a statement of his services and costs incurred in the case. Therein, Trustee Whetzal estimated that the estate likely would have had \$7,625.00 to \$9,625.00 available to pay creditors. He put 13.20 hours of service into the case and incurred \$63.53 in costs. His services focused on investigating the motorcycle's value, continuing the § 341 meeting, objecting to Debtors' claimed exemptions, getting the deadline for filing an objection to discharge extended, responding to Debtor's motion to dismiss, and referring the case to the United States Trustee.

APPLICABLE LAW. A Chapter 7 case may be dismissed only for cause. 11 U.S.C. § 707(a). Unlike in some other Chapters, a Chapter 7 debtor may not dismiss his case voluntarily. Compare 11 U.S.C. §§ 707(a), 1208(b), and 1307(b); *In re Wilde*, 160 B.R. 625, 626-27 (Bankr. W.D. Mo. 1993). Whether to grant a Chapter 7 dismissal is within the discretion of the Court. *In re Leach*, 130 B.R. 855, 856 (9th Cir. BAP 1991) (cites therein); *In re Komyathy*, 142 B.R. 755, 757 (Bankr. E.D. Va. 1992) (cites therein). The principal question for the Court to consider is whether a dismissal will cause some plain legal prejudice to creditors. *Id.* Other

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factors to be weighed include the good faith of the debtor, whether the debtor is guilty of laches, and the absence or presence of creditor consent. *Id.* Equitable considerations are relevant only in the absence of dispositive legal arguments. *Leach*, 130 B.R. at 857. Legal considerations must take precedence. *Id.* at 858. Where the debtor seeks dismissal, the Court also should consider whether there are substantial non exempt assets available for distribution to creditors, *In re Baylies*, 114 B.R. 324 (Bankr. D.D.C. 1990), *Wilde*, 160 B.R. at 627, especially if a discharge has been entered. *Baylies*, 114 B.R. at 325.

PAYMENT OF TRUSTEE. A Chapter 7 trustee receives compensation from two sources: the filing fee and from estate assets. Under 11 U.S.C. § 330(b), a case trustee gets \$60.00 of the filing fee after his services are rendered. In a dismissed case, the trustee will receive the full \$60.00 if the § 341 meeting of creditors has been held. A Chapter 7 trustee may also receive "reasonable compensation" and "reimbursement for actual, necessary expenses" under § 330(a) for his trustee's services. As relates to this case, this compensation may not exceed 25 percent of the first \$5,000.00 disbursed by the trustee and 10 percent for any amount disbursed over \$5,000.00 but not over \$50,000.00.

DISCUSSION. The Court is satisfied that this case should be dismissed. Attorney Hoggatt has represented to the Court that suitable payment arrangements have been made between Debtors and their creditors. Further, neither the United States Trustee nor the United States Attorney are concerned that dismissal will affect any subsequent criminal action. Therefore, Debtors' motion to dismiss the case will be granted.

The remaining question is whether Debtors should be obligated to pay the Trustee's fees and costs in this case. The Code permits the Court to require such payments as a condition of dismissal. 11 U.S.C. §§ 105, 305(a), and 349(b).

Since this case involved potential fraud and necessitated investigative work by the case trustee and an extension of the time to file a discharge complaint, the Court deems it appropriate to assure that the Trustee's related costs and services are paid. After reviewing his statement of fees and costs, the Court is satisfied that 12.80 hours were spent on these non routine matters and should be paid at \$100.00 per hour. All costs will be allowed. The total is \$1,343.53, which Trustee Whetzal has agreed to compromise at \$870.72. Debtors must pay the \$870.72 before the dismissal order will be entered.

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Total notices mailed: 3

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